Nissan Motor Corporation in U.S.A. *and* International Union, United Auto Workers, Region No. 5. Case 27-CA-6960

August 23, 1980

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

On March 19, 1982, Administrative Law Judge William J. Pannier III issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief and the Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Nissan Motor Corporation in U.S.A., Denver, Colorado, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge: This matter was heard by me in Denver, Colorado, on October 27, 1981. On November 26, 1980,[1] the Regional Director for Region 27 of the National Labor Relations Board issued a complaint and notice of hearing, based on an unfair labor practice charge filed on October 14 and amended on October 22, alleging violations of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.*, herein called the Act. Thereafter, a second amended charge was filed on December 3 and on January 9, 1981, the said Regional Director issued an amendment to complaint, alleging an additional violation of Section 8(a)(1) of the Act. Thereafter, pursuant to a notice of intent to amend complaint, issued on October 15, 1981, counsel for the General Counsel further amended the complaint at the hearing to allege additional violations of Section 8(a)(1) of the Act.

All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based upon the entire record, upon the briefs filed on behalf of the parties, and upon my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

At all times material, Nissan Motor Corporation in U.S.A., herein called Respondent, has been a corporation, duly organized under and existing by virtue of the laws of the State of California, which maintains an office and distribution center in Denver, Colorado, where it engages in the distribution of automobile and truck parts. In the course and conduct of these business operations, Respondent annually purchases and receives goods and materials valued in excess of $50,000 directly from points and places outside the State of Colorado. Therefore, I find, as admitted in the answer, that, at all times material, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

At all times material, International Union, United Auto Workers, Region No. 5, herein called the Union, has been a labor organization within the meaning of Section 2(5) of the Act.

[1] In adopting the Administrative Law Judge's findings of independent 8(a)(1) violations, to which no exceptions have been filed, we do not pass on his discussion of *Regal Tube Company*, 245 NLRB 968 (1979). Included in the Administrative Law Judge's unexcepted-to 8(a)(1) findings are his findings on several alleged interrogations. In adopting these findings, *pro forma*, Chairman Van de Water and Member Hunter do not thereby subscribe to the Administrative Law Judge's reliance on *PPG Industries, Lexington Plant, Fiber Glass Division, Inc.*, 251 NLRB 1146 (1980).

[2] We adopt the Administrative Law Judge's conclusion that Respondent did not violate Sec. 8(a)(3) and (1) of the Act by withholding regularly scheduled benefits from unit employees following the election of the Union as their exclusive representative. However, we find *Shell Oil Company, Incorporated and Hawaii Employers' Council, et al.*, 77 NLRB 1306 (1948); *Sun Oil Company of Pennsylvania*, 245 NLRB 59 (1979); and *Empire Pacific Industries, Inc.*, 257 NLRB 1425 (1981), on which the Administrative Law Judge relied, distinguishable from the instant case. Thus, in *Shell Oil*, the Board found that the employer did not violate the Act at a time when negotiations were impending with a newly certified union when it decided to implement unscheduled and "fortuitous" changes in wages and hours. Further, unlike here, *Sun Oil* and *Empire Pacific* involved the failure to grant benefits to union-represented employees while giving such benefits to other employees in the context of an ongoing collective-bargaining relationship. Nevertheless, we adopt the Administrative Law Judge's dismissal of the 8(a)(3) and (1) allegation. In so doing, we emphasize the unusual facts of this case, particularly the absence of any 8(a)(5) allegation, the fact that the parties engaged in collective-bargaining negotiations with no showing by the General Counsel that the parties did not negotiate on wages, and the absence of evidence that Respondent used the withholding of the wage increases to undermine employee support for the Union or made comments implying that the Union or the employees' selection of the Union as representative was the cause of the withholding. Finally, we do not rely on the Administrative Law Judge's finding that, by electing the Union as their representative, the employees had become ineligible for wage increases under Respondent's nonexempt wage program, applicable to "non-union warehouse classifications."

[1] Unless stated otherwise, all dates occurred in 1980.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Issues Presented*

On August 22, the representation petition in Case 27–RC–6096 was filed. On October 2, 10 of 16 employees in the bargaining unit of warehouse operators employed at Respondent's Denver facility[2] voted in favor of representation by the Union. On October 10, a Certification of Representative issued, certifying the Union as the exclusive representative of all employees in that unit. It is alleged that, prior to the election, Respondent violated Section 8(a)(1) of the Act, on various occasions and through various admitted supervisors,[3] by coercively interrogating employees, by soliciting employee grievances with an implied promise of correction, and by threatening that employees would not be considered for transfer to another position because of the Union's organizing campaign. Respondent denies that it committed any unfair labor practices prior to the election and, further, denies that it is responsible for any unlawful statements made by the supervisors enumerated in footnote 3, *supra*. Moreover, Respondent asserts that its preelection statements were so innocuous that, even if unlawful and even if it is responsible for them, issuance of a remedial order is not warranted. Further, it moves to dismiss those allegations on the ground that, following negotiation of a collective-bargaining agreement with Respondent, the Union had requested that its unfair labor practice and charges be, in effect, withdrawn insofar as they were concerned, but that the Regional Director had refused, improperly according to Respondent, to approve their withdrawal.

It is alleged further that Respondent violated Section 8(a)(3) and (1) of the Act by denying scheduled semiannual salary raises and progression raises to unit employees on October 6. In this respect, it is not disputed that, following the Union's victory in the October 2 election, and aware that it did not intend to contest that victory by filing objections, Respondent had decided not to grant wage increases to warehouse operators in the bargaining unit. However, Respondent denies that its motive for doing so had been one proscribed by the Act. Rather, it contends that it had done so because it was aware that those employees had selected a bargaining representative, that bargaining would commence shortly for a collective-bargaining agreement, that wages was one of the subjects concerning which Respondent would have to bargain with the Union, and that it feared that it would be charged with commission of an unfair labor practice if it did so.

B. *The Facts*

For the most part, the facts underlying the issues presented in this case are not disputed. Prior to the filing of the representation petition, a survey had been conducted among, at least, the warehouse operators employed in Denver. In early September, Cabibi, Duckworth, and David, at least, had journeyed from Respondent's Compton, California, headquarters to the Denver facility to report the results of that survey to employees located there. So far as the record discloses, this had been the first occasion when the Denver warehouse operators had encountered those officials. Following their arrival, the Compton officials, along with Green, met with the warehouse employees and explained the purpose of their visit. According to Warehouse Operator Kip Cavey, during the course of that explanation Respondent's officials "told us that they were there about the survey that they had taken earlier and they wanted to find out what some of the problems were that they were having and that they were going to take care of them and get things settled back to down to where they should be." Then, Respondent's officials invited the employees to ask any questions concerning matters of interest to them. In response to a question regarding whether "there would be any recoursive [sic] action taken against any of the employees for union activity," Cabbi had announced "no, that there would not be any recoursive action taken." Warehouse Operators Cavey and Matthew Baldwin both described a question, by employee Dan Lewis, concerning Respondent's intention with regard to filling a vacancy for in-house parts representative that then existed.[4] Both Baldwin and Cavey testified that the response to Lewis' question simply had been that Respondent would not be filling the position at that time because the Union might consider doing so a bribe or favoritism toward the employee who was transferred to it.

Like Baldwin, Cavey also described a separate conversation regarding the in-house parts representative position, only in his case it had been with both Green and Western States Area Parts Manager Legget. According to Cavey, in late September, during a break period, he had encountered the two management officials coming into the warehouse and had inquired concerning the vacant position. Green, testified Cavey, had replied that "they couldn't give me the job and it would depend on how the vote came out on whether I would get the job or not." Further, Cavey testified that, toward the end of

[2] The unit as described if the representatign proceeding is:

All warehouse employees employed by Nissan Motor Corporation in U.S.A. located at 11000 East 45th Avenue, Denver, Colorado; excluding confidential employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

[3] Respondent admits that, at all times material, Ron D. Cabibi has been its director of employee relations; Keith Duckworth has been its security manager; Robert David has been its national parts administrative manager; Craig Legget has been its western states area parts manager; William Green has been its Denver regional parts manager; and Greg Webb had been its Denver warehouse supervisor. Further, Respondent admits that, at all times material, each of these persons has been a supervisor within the meaning of Sec. 2(11) of the Act. However, Respondent denies the further allegation that, at all times material, each of these individuals has been its agent within the meaning of Sec. 2(13) of the Act.

[4] The in-house parts representative position is a nonunit one which, in essence, involves serving as, according to Green, "a communications link concerning orders and problems solving for the dealer body." While a warehouse operator transferring to that position probably would incur an initial reduction in pay, because the entry level rate is lower than most warehouse operators are paid, appointment as an in-house parts representative presents the possibility of advancement to higher level positions that are compensated at a higher rate than the position of warehouse operator. In this fashion, appointment as an in-house parts representative provides an employee with the benefit of potential advancement to a higher rated position than would be possible if that employee remained classified as a warehouse operator.

the conversation, Legget had "asked me how I thought the vote would go again and . . . I told them an answer of 13 to to [sic] 3, and they both just kind of looked down and the conversation was over."[5]

Green testified that, when Greg Webb had been promoted to warehouse supervisor in August, an in-house parts representative vacancy had been created. However, he testified further, following the posting period for that vacancy, Respondent had decided not to fill the position until after the election inasmuch as both Cavey and Baldwin had applied for it, leaving Respondent in

> . . . a no-win situation in that if we, in fact, hired an applicant from the warehouse, it could be construed as possibly an unfair labor practice in that we were reducing the total number of people in the warehouse by one. If we did not, the reverse could be held true, that we were discriminating against a potential union member by not hiring him.

Consequently, testified Green, "the only alternative we felt was available to us was to postpone any decision on filling the position until after the election and the potential of an unfair labor practice." Green agreed that there had been an occasion, shortly before the election, when he and Legget had participated in a discussion of this issue with Cavey. According to Green,

> Prior to Mr. Cavey approaching me, he and Mr. Baldwin were discussing something of which I was not aware of and they made the comment that—Kip made the comment that he was going to ask and came over and proceeded to ask basically what the status was of the position, why they weren't being considered, and I explained to him what I had mentioned previously, that we were going to postpone the decision on the grounds of the potential unfair labor practice.

Green denied ever having stated to Cavey that the decision regarding who would be selected to fill the vacancy depended upon the vote in the election. However, Green did not deny that Legget had concluded the conversation by questioning Cavey regarding the degree of continued employee support for the Union.

Remarks concerning the in-house parts representative position were not the only ones alleged to have been made, by Respondent's officials, in violation of the Act. As noted above, Cavey described a conversation with Legget, prior to the late September one with Green and Legget. It is undisputed that Cavey had been summoned to the office between September 8 and 12 where, during a discussion of warehouse employee problems, Legget had asked, "How do you think the vote will go?" After Cavey had replied "about 15 to 1" in favor of the Union, Legget "got kind of a glum look on his face and he says, 'I hope you'll vote for the Company.'" Similarly, it is undisputed that, toward the end of September, Baldwin had been asked by Security Manager Duckworth "if we voted that day, what [Baldwin] thought the outcome of the vote would be."[6]

Questioning of a somewhat different nature was attributed to Duckworth by Warehouse Operator Shirley Meister. She testified that in late September, he had come to her work station, had initiated a discussion of various problems, and had pointed out that most of the warehouse employees were only "kids who didn't realize what they were getting into by bringing the Union into the Company." According to Meister, Duckworth then had enumerated "different pros and cons" of unionizing, in the process observing "that the Union could not help us and that they would not back us and that the Company could not work as close with us having the Union in there [and] if the Union was not there, the Company could work closer with us." Then, testified Meister, Duckworth had asked why she felt that she needed a union and she had replied to obtain job security because of her age and because she felt that, as a volunteer organizer, she would be among the first ones fired if the Union did not prevail in the election. She testified that, in response, Duckworth had tried to reassure her that she would not be fired, in the process asking if a letter of assurance from Respondent's president would satisfy her concern. According to Meister, when she had replied that it would not, Duckworth then had asked, "Well, what would the Company have to guarantee you to keep you from voting union?" she replied, "nothing." Meister's description of this conversation was not contradicted.

Finally, with regard to questioning, Mary Connie Gonzales, then senior secretary for the parts department, testified that, during a casual conversation in the lunchroom prior to commencement of work on the day of the election, Webb had asked her how Ed Cisneros, her boyfriend and one of the warehouse employees, "was going to vote or do that day," and that she had replied that she did not know. Webb denied having participated in any conversation with Gonzales on the day of the election and denied having ever asked her how Cisneros was going to vote. However, he conceded that, during lunch shortly before the election, he had sat down with her in the lunchroom and had asked her how she thought Cisneros felt about Respondent, how she felt toward the Union and how she thought the vote was going to go.

In a different vein, it is undisputed that, a couple of days after the early September meeting with employees, Baldwin had been summoned to the office where Cabibi had said that he wanted to get to know Baldwin and would be talking individually with everybody to ascertain the various problems, after which he would be meeting with the members of management "to see about correcting the problems in the warehouse." After the two

[5] As described below, Cavey testified that Legget had directed a similar question to him (Cavey) during a previous conversation.

[6] This conversation had been initiated when Baldwin had been summoned to the office where he had been shown collective-bargaining agreements with certain other employers; had been told that in the case of one of them, the employees had gone out on strike but had "only received 5 cents more in this bargaining"; and had been told by National Parts Administrative Manager David, who also had been present, "that it was not worth all the time and negotiating and the strike that they had gone to to receive that 5 cents more and that's what we were looking for."

men had discussed various problems, such as unsafe conditions, supervisors, and the need for warehouse expansion,

> Cabibi said [sic] that the changes and corrections in the warehouse would be done and that it would take some time and that he hoped that the employees would believe that it would be changed and that whether—-that an employee was better represented by himself than by a third party and that the changes would take place.

With regard to the alleged postelection violation of Section 8(a)(3) and (1) of the Act, the parties entered into certain stipulations which served to focus the issue presented: Prior to the election, pay scales for unit employees had been based on Respondent's nonexempt rate schedule for nonunion warehouse classifications; those schedules provide that warehouse operators progress automatically from step to step within classification, "on the first Monday of each successive April and October, unless such progression is deferred due to justified action documented in writing"; during the 5-year period prior to the election, those schedules had been revised semiannually to provide pay increases in at least some portions of the rate progression schedule; over the course of that same 5-year period, all unit employees had received wage increases in accordance with that schedule; because the Union had won the election on October 2 and inasmuch as Respondent did not intend to file objections, Cabibi had made the decision not to proceed with increases which would otherwise have been granted to unit employees effective October 6; and, as part of the bargaining process leading to an agreement between the Union and Respondent, the latter agreed, in a separate side agreement, to pay a $50 special one-time payment to each unit employee on the payroll during the time that the discussions had occurred.

C. *Analysis*

As set forth above, there were five occasions when employees were asked questions that allegedly violated Section 8(a)(1) of the Act: between September 8 and 12, in the office, when, during the course of a discussion pertaining to warehouse problems, Legget had inquired how Cavey thought the vote would go and had said that he hoped that Cavey would vote for Respondent; in late September, when, following a discussion of pros and cons of unionization, warehouse operator Meister had been asked by Security Manager Duckworth why she felt that she needed a union, whether a letter from Respondent's president would allay her concerns regarding job security and what could Respondent do to keep Meister from voting for the Union; in late September, in the office, when Duckworth had asked, following a review of various collective-bargaining agreements, what Baldwin "thought the outcome of the vote would be"; in late September, after a conversation concerning filling the vacant in-house parts representative position, when Legget had asked how Cavey "thought the vote would go"; and, in late September, when Webb questioned Gonzales about her sympathies and those of Cisneros, and about the election outcome.[7] Although, as Respondent points out in its brief, interrogation is not a *per se* violation of the Act, nevertheless when it pertains to union sympathy and affiliation it has a natural tendency to create employee fear of discrimination and to present a danger of coercion of employees. See, e.g., *World Wide Press, Inc.*, 242 NLRB 346, 362-363 (1979), and cases cited therein.

Here, neither Legget nor Duckworth was called as a witness. Accordingly, there is no testimony explaining their reasons for having questioned Baldwin, Cavey, and Meister. While Webb did testify, he did not explain his reasons for having posed the questions that he admittedly directed to Gonzales. Nor has it been shown that Respondent would have had a legitimate interest in knowing the information sought by these questions under the circumstances presented in the instant case. To the contrary, while it can be speculated—absent testimony by Legget, Duckworth, and Webb—that Respondent's officials merely had been displaying normal curiosity, Duckworth's questions to Meister hardly are encompassed within the realm of "normal curiosity." For he had initiated a conversation with her in which he had expressly asked her why she felt that she needed a union, if a letter of assurance from Respondent's president would allay her concern about job security and, finally, "what would the Company have to guarantee . . . to keep [her] from voting union?" Such inquiries hardly are innocuous. Rather "inquiries of this nature constitute probing into employees' union sentiments which . . . reasonably tend to coerce employees . . . . even in the absence of threats of reprisal or promises of benefit . . . [by] convey[ing] an employer's displeasure with employees' union activity . . . ." *PPG Industries, Inc., Lexington Plant, Fiber Glass Division*, 251 NLRB 1146, 1147 (1980); see also *Grandee Beer Distributors, Inc.* v. *N.L.R.B.*, 630 F.2d 928, 932 (2d Cir. 1980). Similarly, the questions directed to Baldwin and Cavey, regarding the outcome of the election, and to Gonzales, regarding specifically her own and Cisneros' sympathies, as well as how she thought the election would turn out, leave the obvious impression that the questioner is seeking to ascertain the extent of the Union's strength among employees and, further, is seeking "information that could be used by Respondent to discourage or prevent by both lawful and unlawful means the unionization of those employees." *Brooks Cameras, Inc.*, 250 NLRB 820, 821 (1980). Significantly, in none of the conversations was it explained to the employees why they were being questioned in this manner. See, e.g., *Hedstrom Company* v. *N.L.R.B.*, 629 F.2d 305 (3d Cir. 1980). Consequently, viewed from the standpoint of the employees, *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 617 (1969), Respondent was seeking information for "purposes that could only seem ominous." *N.L.R.B.* v. *Aero Corporation*, 581 F.2d 511, 514 (5th Cir. 1978).

[7] In view of Webb's admission concerning the questions that he had asked Gonzales, it is unnecessary in the circumstances presented here to resolve whether or not Webb had explicitly asked Gonzales how she felt that Cisneros would vote on the morning of the election.

Although the employees candidly answered the questions put to them, most of the questioning that occurred here was not conducted by low-level supervisors, nor even by supervisors who, so far as the record discloses, ordinarily dealt with and supervised the work of the employees who were questioned. Rather, most of it was conducted by Respondent's western states area parts manager and by its security manager. Cf. *Federal-Mogul Corporation* v. *N.L.R.B.*, 566 F.2d 1245 (5th Cir. 1978). True, Meister and Cavey during the late September conversation had been questioned in their work areas. Yet, the questioning of Baldwin and of Cavey in mid-September had taken place in the privacy of Respondent's office, during conversations occurring when each of these employees had been summoned there from his workplace. Cf. *Id.*

The questioning of Meister was followed by a specific promise to cure a major concern that she stated had been motivating her to support the Union and, then, by a further question regarding what steps Respondent might take to persuade her not to vote for the Union. No similar express efforts to correct employee concerns accompanied the questioning of Baldwin and Cavey. However, both of them were applicants for the vacant in-house parts representative position which Respondent was deferring filling until after the election. It is, of course, accurate that, during the early September meeting with warehouse operators, Cabibi had assured them that no "recoursive action" would be taken against them for union activity. Nevertheless, employees are not obligated to accept such a generalized pledge when confronted by questions, as set forth above, of an inherently coercive nature, asked during subsequent private conversations with high-level management officials, with whom, for the most part, the employees had had no prior acquaintance. Consequently, in addition to the inherent tendency of the questions to convey Respondent's displeasure with unionization, Baldwin's and Cavey's situation as applicants for that position carried an inherent compulsion to answer the questions put to them, thereby disclosing the extent of their coworkers' ongoing support for the Union. Indeed, in not one of these individual conversations did Respondent's officials assure the questioned employee that he or she could decline to answer the questions being put to them, nor, so far as the record discloses, was there a specific renewal of Cabibi's earlier assurance against reprisals. See, e.g., *Clear Pine Mouldings, Inc.* v. *N.L.R.B.*, 632 F.2d 721, 725 (9th Cir. 1980); *World Wide Press, supra*, and cases cited therein; cf. *F.C.F. Papers, Inc., a Division of The Mead Corporation*, 211 NLRB 657 (1974).

Therefore, I find that Respondent's questioning of these employees interfered with their exercise of Section 7 rights and thereby violated Section 8(a)(1) of the Act.[8]

The complaint alleges also that Respondent violated the Act when Cabibi had solicited grievances during his private conversation with Baldwin, following the general meeting with warehouse employees on September 5, and, additionally, when Green had solicited employee grievances from Baldwin during their mid-September conversation. As set forth above, in both conversations Respondent's officials had inquired about the specific problems in the warehouse and Cabibi had said expressly that he hoped that the employees would believe that changes would be made. Based upon these conversations, the General Counsel argues that Respondent solicited employee grievances in the midst of an organizing campaign and that, absent a showing that it "previously had a practice of regularly soliciting employee grievances or complaints," Respondent violated Section 8(a)(1) of the Act. However, these remarks cannot be analyzed so simply.

"It is firmly established that an employer violates section 8(a)(1) by his solicitation of grievances, if accompanied by an express or implied promise to remedy the grievance if the union is rejected in the election." *N.L.R.B.* v. *Garry Manufacturing Company*, 630 F.2d 934, 943 (3d Cir. 1980). Accord: *N.L.R.B.* v. *Delight Bakery, Inc.*, 353 F.2d 344, 345 (6th Cir. 1965). However, so far as the evidence shows, the survey which had led to these questions regarding warehouse problems had been decided upon and conducted prior to the filing of the representation petition and prior to the time that Respondent had learned of the organizing campaign. Consequently, based upon the record in this matter, there is no basis for concluding other than that "the survey was conceived for legitimate business reasons and was not designed in response or opposition to the Union's organizing effort." *Leland Stanford Jr. University*, 240 NLRB 1138, fn. 1 (1979). As set forth above, in describing the September 5 meeting, Cavey testified that Cabibi had announced specifically that, having reviewed the survey results, the Compton officials had come to Denver "to find out what some of the problems were that they were having and that they were going to take care of them . . . ." Neither in the complaint nor in the brief filed on behalf of the General Counsel is it alleged or argued that these promises by Cabibi violated the Act. Nor does the General Counsel argue that further investigation of the problems disclosed by the survey had not been contemplated by Respondent at the time that it had made the decision to conduct it. Consequently, so far as the evi-

[8] It is accurate that *Alley Construction Company, Inc.*, 210 NLRB 999 (1974), and *Regal Tube Company*, 245 NLRB 968 (1979), included conclusions that the employers there did not engage in improper conduct when they asked employees for their opinions about election outcomes. However, in *Alley Construction*, there were but two instances where such questions had been directed to employees, whereas here, such questions were directed to employees, in a much smaller bargaining unit, on four occasions over the course of almost a 1-month period prior to the October 2 election. Moreover, on one of the occasions in *Alley Construction*, the questioning supervisor expressly had assured the questioned employee that "he should vote the way he wanted but be sure to vote" (*id.* at 1006). Not only is a similar specific assurance absent in each of the incidents presented in the instant case, but as part of his separate questioning of Meister, Duckworth expressly had attempted to ascertain what Respondent could do to persuade her to vote against representation.

In *Regal Tube*, the administrative law judge simply dismissed the allegation pertaining to the question about how an employee "thought the election would go," without providing any analysis or explanation of his underlying reasons. While the General Counsel filed cross-exceptions in that case, there is no indication whether the Administrative Law Judge's conclusion regarding that question had been one of the items to which cross-exceptions had been taken. Consequently, there is no basis for concluding that the Board actually reviewed and affirmed that particular conclusion.

dence and arguments show, the trip by the Compton officials to Denver and their efforts to secure information concerning warehouse employees' specific problems had been a natural outgrowth and continuation of a process planned and set into motion before Respondent had learned of the organizing campaign. Obviously, the Act permits Respondent to continue that process notwithstanding the filing of the petition inasmuch as "an employer must proceed with the withholding or granting of benefits as it would have done had the union not been conducting an organizational compaign." *J. J. Newberry Co., a Wholly Owned Subsidiary of McCrory Corporation*, 249 NLRB 991, 992 (1980), enfd. as modified 654 F.2d 148 (2d Cir. 1981).

However, in conducting the individual interviews with Baldwin and Cavey arising from the survey process, Respondent's officials made certain remarks concerning the changes and the Union. Thus, Cabibi had said that the changes would occur and that he hoped that the employees would believe that they would take place. Further, he had said that he believed that an employee was better represented by himself than by a third party. During his mid-September conversation with Baldwin, Green also had said that he felt an employee was better represented by himself than by a third party and that he hoped that the employees would put their trust in Respondent and vote that way. Of course, an employer is free to express the opinion that employees would be better off without representation and to appeal for the support of its employees in a representation election. See, e.g., *Howard Johnson Company*, 242 NLRB 386 (1979). Moreover, an employer is free to inform "its employees of their present benefits during an election campaign. *Philips Medical Systems, Inc.*, 243 NLRB 944, fn. 4 (1979); accord: *Pace Oldsmobile, Inc.*, 256 NLRB 1001 (1981). Of course, Respondent's plan to make changes, as a result of the survey process, constitutes a benefit for its employees. True, in their conversations, Respondent's officials were speaking of undetermined changes in employment conditions, rather than describing already existing employment terms or contemplated specific changes in employment term. Yet, this ambiguity arose not because of the petition and election process. Rather, it arose because the election petition had been filed in the midst of a survey process that, so far as the record discloses, had been intended to uncover and lead to corrections in employment conditions with which the warehouse operators were dissatisfied.

Consequently, in their remarks to Cavey and Baldwin, Cabibi and Green, respectively, were doing no more than pointing with pride to an already implemented process as a basis for seeking support in the representation election. At no point in either of the conversations relied upon by the General Counsel can it be said that Respondent's officials had promised to alter the course of the survey process because of the petition. Nor is there evidence that the statements by Cabibi and Green would lead an employee to conclude that these changes, in deficiencies disclosed by the survey and interview process, "would be forthcoming only if he rejected the Union." *Edmund Homes, Inc.*, 255 NLRB 809, 815 (1981). Therefore, I conclude that the remarks of Cabibi and Green in these conversations did not constitute violations of Section 8(a)(1) of the Act.

Notwithstanding the foregoing analysis of Cabibi's and Green's conversations, it is clear that there was a solicitation of grievances and a promise to remedy them during Duckworth's conversation with Meister. Thus, as set forth above, he expressly had asked her why she was supporting the Union. In response to her expression of concern regarding job security he first had expressly offered to secure a letter of assurance from Respondent's president and then had asked for Meister's opinion as to what Respondent could do "to keep [her] from voting union." Thus, not only did Duckworth solicit her grievance, but he also made express offers in an effort to attempt to correct the one she identified in an effort to persuade her not to vote for the Union. His remarks were not, so far as the record discloses, a part of the survey process that was then in progress. There is no evidence that Respondent had shown a previous concern, unrelated to the survey process, with employee concerns and grievances. Accordingly, in his remarks to Meister, Duckworth had exuded "a previously undemonstrated solicitude for communicating with [her] and meeting [her] problems . . . ." *N.L.R.B.* v. *Delight Bakery, Inc.*, 353 F.2d 344, 345 (6th Cir. 1965). Therefore, I find that by his questioning and express promise to Meister, Duckworth engaged in conduct proscribed by the Act.[9]

Finally, with regard to the preelection conduct, it is undisputed that Respondent withheld selection of a replacement for Webb, as in-house parts representative, to preclude any possible accusation of interference with the scheduled election. Ordinarily, where an employer withholds benefits increases[10] because of "the presence of the union and pendency of the election and advise[s] employees that their . . . increases [are] being withheld for this reason," it violates Section 8(a)(1) of the Act. *The Gates Rubber Company*, 182 NLRB 95 (1970). Accord: *Hydro Conduit Corporation*, 240 NLRB 48, fn. 1 (1979). Further, statements telling employees that benefits are being withheld for these reasons have "the obvious effect of discouraging employees from exercising their right to organize and bargain collectively." *N.L.R.B.* v. *Otis Hospital*, 545 F.2d 252, 255 (1st Cir. 1976).

"However, where employees are told *expected* benefits are to be deferred pending the outcome of an election in order to avoid the appearance of election interference,

[9] Although this finding pertains to a matter not alleged in the complaint and which, in his brief, the General Counsel does not contend should be the basis for a finding of unlawful solicitation of grievances and promises of correction, it is a matter which was related to those alleged in the complaint, occurred during the same time period as other matters alleged in the complaint, was "fully litigated at the hearing," and was one concerning which "Respondent had ample opportunity to offer . . . evidence . . . ." Seemingly, therefore, the Board now deems such situations to require that an appropriate remedy be provided. *Alexander Dawson, Inc. d/b/a Alexander's Restaurant and Lounge*, 228 NLRB 165 (1977), enfd. 586 F.2d 1300 (9th Cir. 1978); contra: *Medicine Bow Coal Company*, 217 NLRB 931, fn. 2 (1975).

[10] As set forth in fn. 4, *supra*, appointment to the position of in-house parts representative was viewed as a benefit by the employees because of the potential for promotion to higher rated positions from it than is possible if an employee remains a warehouse operator.

the Board will not find a violation of the Act." *Centre Engineering, Inc.*, 253 NLRB 419, 421 (1980). In determining whether or not the foregoing exception or limitation, to the general proposition that Section 8(a)(1) of the Act is violated when an employer advises employees that benefits are being withheld because of the presence of a union and/or pendency of an election, applies to particular announcements that benefits are being deferred to avoid the appearance of election interference, several factors must be assessed. Thus, the Board and the courts have examined whether or not the union involved has made any threat to protest conferring the benefits, or whether or not there is some other basis for the employer to fear such a protest;[11] whether and in what fashion the employer has made an effort to secure the union's consent to institution or increase of the benefits;[12] whether in its remarks to employees concerning the benefits, the employer makes clear that the deferral is occasioned by a desire to avoid the appearance of election interference;[13] whether or not the employer assures the employees that the benefits will be granted regardless of the results of the election;[14] whether or not the employer's comments regarding deferral of the benefits are made in the context of an antiunion appeal;[15] and whether or not the announcement of deferral of benefits has been made at a time when the employer was committing unfair labor practices.[16]

Had only the answer to Lewis' question during the general meeting and Green's response to Baldwin's mid-September question been involved in this case, there might well be a basis for concluding that Respondent's statement concerning the in-house parts representative position did not violate the Act. For even though there has been no showing of a threat by the Union to protest selection of someone to fill the vacancy, changes in benefits and status of unit employees during preelection periods are not infrequently the subject of unfair labor practices charges. Respondent is represented by experienced counsel whose familiarity with labor law would provide it with ample basis for concern about the possibility of such a charge were a selection to have been made as Webb's replacement prior to the election. Moreover, while it does not appear that Respondent had made any effort to secure the Union's consent to selection of a replacement in-house parts representative, it was explained, both to the employees at the September 5 meeting and to Baldwin in mid-September, that the selection process was being deferred only until completion of the election process. Further, in response to Baldwin's own question during the early September meeting, the employees had been assured that no "recoursive action" would be taken against them for union activities.

However, as found above, following the early September meeting with all warehouse operators, Respondent's officials began engaging in unfair labor practices, with the result that more is involved here than simply the early September reply to Lewis' question and Green's reply to Baldwin's question in mid-September. For by the time that Green had spoken to Baldwin in mid-September, Cavey had been interrogated unlawfully by Legget. Further, Green's answer to Baldwin had been given during a conversation in the office in which Green had campaigned against the Union. More significantly, in their late September conversation, after Green had replied to Cavey's question concerning the in-house parts representative vacancy,[17] Legget had immediately renewed his questioning concerning how Cavey felt the election would come out. So far as the record discloses, there was no valid purpose for asking the question, nor for doing so at that point in time. As found above, such a question creates an obvious impression that the employer is attempting to obtain information that can be used to discourage or prevent unionization of its employees. *Brooks Cameras, Inc., supra*, 250 NLRB 820. Consequently, its propinquity to Green's and Cavey's exchange regarding the vacant in-house parts representative position, for which the latter was one applicant, conveys a subtle message that harm would come to Cavey, with regard to selection for that position, if he supported or continued to support unionization of the warehouse operators. Therefore, I find that, in the circumstances, Legget's comments constituted an implied threat that Cavey would no longer be considered for transfer to the position of in-house parts representative because of the Union's organizing campaign, thereby violating Section 8(a)(1) of the Act. See, e.g., *Bryant Chucking Grinder Company* v. *N.L.R.B.*, 389 F.2d 565, 567 (2d Cir. 1967).

Respondent makes essentially two general arguments to support its overall position that a remedial order should issue as a result of the foregoing preelection statements by supervisors. First, it denies the agency status of Duckworth, Legget, Green, and Webb. Yet, Respondent admits that each of them is its supervisor. Consequently, Respondent "is presumptively liable for their words and deeds." *N.L.R.B.* v. *Big Three Industrial Gas & Equipment Co.*, 579 F.2d 304, 310 (5th Cir. 1978). Duckworth had come to the Denver facility with other officials from Respondent's headquarters. Both he and Legget had questioned employees unlawfully. Any argument that might be predicted on the low-level status of Webb in Respondent's supervisorial chain, see, e.g., *Butler-Johnson Corporation* v. *N.L.R.B.*, 608 F.2d 1303, 1306 (9th Cir. 1979), is dispelled by the similarity of his offending statements to those of higher officials. For, as had Duck-

[11] See, e.g., *Marathon Metallic Building Company*, 224 NLRB 121, 123 (1976); *Marine World USA*, 236 NLRB 89, 90 (1978), enforcement denied 611 F.2d 1274 (9th Cir. 1980)

[12] See, e.g., *McCormick Longmeadow Stone Co., Inc.*, 158 NLRB 1237 (1966).

[13] See, e.g., *Chatfield-Anderson Co., Inc., d/b/a Truss-Span Company*, 236 NLRB 50, 51, fn. 6 (1978), enfd. as modified on other grounds 606 F.2d 266 (9th Cir. 1979); *Signal Knitting Mills, Inc.*, 237 NLRB 360, 361, fn. 4 (1978); *Marathon Metallic Building Company, supra.*

[14] See, e.g., *Signal Knitting Mills, supra; Centre Engineering, supra.*

[15] See, e.g., *Marathon Metallic Building Company, supra.*

[16] See, e.g., *Chatfield-Anderson Co., supra.*

[17] As set forth above, Green denied having told Cavey that selection of an in-house parts representative would depend upon how the vote came out in the election. I credit that denial inasmuch as it appeared to me that Green had a better recollection than Cavey of what had been said during that conversation and, further, because it appeared to me that, with respect to that portion of that conversation, Cavey had been describing his subjective impressions of the gist of what he was being told, rather than the words actually used by Green.

worth and Legget, Webb had engaged in interrogation regarding employee sympathies and the extent of employee support for the Union. Consequently, the employees would have "just cause" to believe that Respondent had authorized these remarks. *Id.; Capitol Foods, Inc. d/b/a Schulte's IGA Foodliner*, 241 NLRB 855 (1979), and cases cited therein.

Second, Respondent argues that any violation which it did commit was minor in nature and that its violations have been cured effectively by its subsequent amicable relations with the Union, as best illustrated by the latter's efforts to withdraw those portions of the charge pertaining to preelection statements by Respondent. Yet the fact that a charging party may consider the subject of a charge or a portion of a charge to be moot or settled does not oblige the Board nor its regional directors to consent to its withdrawal. See, e.g., *APD Transport Corp. and its Alter Ego, National Book Consolidators, Inc.*, 253 NLRB 468, 469-470 (1980). While it is accurate that Respondent's preelection unfair labor practices were not the most heinous nor flagrant possible violations of the Act, "even a single victim of a small-scale violation of the Act (which exceeds *de minimis*) is entitled to the Board's attention." *St. Regis Paper Company*, 192 NLRB 661, 662 (1971).

Here, the unfair labor practices were committed by a number of Respondent's supervisors. They were committed throughout the month of September. Moreover, Respondent's unfair labor practices, particularly its repetitive questioning concerning the extent of the Union's continuing support, are of type that, having been made during an election campaign, "can reasonably be expected to have been discussed, repeated, and disseminated among the employees, and, therefore, the impact of such statements will carry beyond the person to whom they are directed." *United Broadcasting Company of New York, Inc.*, 248 NLRB 403, 404 (1980). Accord: *Professional Research, Inc., d/b/a Westside Hospital*, 218 NLRB 96 (1975). Finally, Respondent concedes that at no point has it assured the Denver warehouse operators that there will not be a recurrence of its preelection offenses should the employees engage in activities protected by the Act, but contrary to Respondent's interests and desires.[18] In short, Respondent has never repudiated its preelection misconduct. See, e.g., *Tulsa Division, Byron Jackson Pump Division, Borg-Warner Corporation*, 234 NLRB 1283, 1286 (1978), enfd. 608 F.2d 1344 (10th Cir. 1979); *N.L.R.B.* v. *Austin Power Company*, 350 F.2d 973 (6th Cir. 1965).

Therefore, I conclude that the preelection violations of the Act were not *de minimis* and that issuance of a remedial order pertaining to them is waranted "to inhibit the recurrence of [Respondent's] unlawful conduct." *N.L.R.B.* v. *Local 1445, United Food and Commercial Workers International Union, AFL-CIO*, 647 F.2d 214, 217 (1st Cir. 1981). Accordingly, I deny Respondent's motion to dismiss these allegations.

As set forth above, it is conceded that wage increases would have been granted to Denver warehouse operators on October 6, but for their selection of the Union as their bargaining representative in the election conducted 4 days earlier. As a general proposition, "the withholding of wage increases . . . from employees who . . . have chosen a union as their collective-bargaining representative violates Section 8(a)(3) and (1) of the Act if such employees otherwise would have been granted the wage increases . . . in the normal course of the employer's business." *Verona Dyestuff Divison Mobay Chemical Corporation*, 233 NLRB 109, 111 (1977). Accord: *Holland American Wafer Company*, 260 NLRB 267 (1982); *Florida Steel Corporation*, 220 NLRB 1201, 1203 (1975). Consequently, absent other considerations, it could be concluded that Respondent violated Section 8(a)(3) and (1) of the Act by failing to continue applying its semiannual program to employees who would otherwise have received them, but for their selection of the Union as their bargaining representative. However, other considerations are present in this case.

The program pursuant to which the Denver warehouse operators would have received wage increases on October 6 is one intended to encompass, as its title states, only "nonunion warehouse classification." As a result of the election, the Denver warehouse operators had removed themselves from the scope of that program. By having selected the Union as their bargaining representative, as of October 2, they were seeking to bargain with Respondent through a statutory representative. Concomitantly, inasmuch as it did not intend to challenge the results of the election by filing objections to it, Respondent intended to commence negotiations with the Union, as the statutory representative of the Denver warehouse operators. It is settled that "an employer is under no obligation under the Act to make . . . wage increases applicable to union members, in the face of collective bargaining negotiations on their behalf involving much higher stakes." *Shell Oil Company, Incorporated, et al.*, 77 NLRB 1306, 1310 (1948). Accord: *Empire Pacific Industries, Inc.*, 257 NLRB 1425 (1981). Of course, it would be an unfair labor practice if wage increases granted to all employees are withheld from those who are represented *if* it is shown that the withholding is motivated by considerations proscribed by the Act. *Id.* However, to establish unlawful motivation, evidence beyond the mere withholding from represented employees of wage increases granted to represented employees, itself, must be adduced. For, of itself, that disparity is "not so 'inherently destructive of important employee rights' that an unfair labor practice should be found even in the absence of proof of such a motive." *Sun Oil Company of Pennsylvania*, 245 NLRB 59 (1979).

Here, as found above, Respondent did commit unfair labor practices prior to the election. However, as pointed out above, these were not of the most heinous nor flagrant type that could be committed. Indeed, they were

[18] Thus, though the employees have selected a bargaining representative, that does not end the matter. Grievance proceedings and negotiations may result in employee sympathy for positions contrary to those of Respondent. Moreover, it is not beyond the realm of possibility that decertification proceedings or proceedings to replace the Union with another representative may be instituted. Consequently, the fact that the employees have selected the Union as their bargaining representative hardly removes the opportunity for future protected activity by them and the resultant need to assure them that they have a protected right to engage in it.

not the type that logically could be characterized as demonstrating a complete rejection of the collective-bargaining process. More signficantly, there is neither an allegation nor evidence to support an allegation that, following the election, Respondent continued to commit unfair labor practices. To the contrary, Respondent engaged in negotiations and concluded a collective-bargaining agreement with the Union. Cf. *Verona Dyestuff Division, supra*. So far as the record discloses, Respondent fulfilled its bargaining obligation without engaging in any conduct that could be characterized as bad-faith bargaining. Cf. *Chevron Oil Company, Standard Oil Company of Texas Division*, 182 NLRB 445 (1970), enforcement denied 442 F.2d 1067 (5th Cir. 1971). Indeed, possibly the most significant factor with regard to this allegation is the absence of any additional allegation that Respondent had violated Section 8(a)(5) of the Act by discontinuing application of its semiannual program to Denver warehouse employees.[19] Nor can it be said on the basis of this record that the General Counsel has shown that Respondent and the Union did not negotiate concerning the subject of wages during those negotiations. *Sun Oil Company, supra*, 245 NLRB at 61 (dissenting opinion of Member Jenkins). Indeed, the parties stipulated that there had been agreement on a one-time payment of $50 to unit employees on the payroll at the time of their discussions. Finally, there is no evidence that Respondent had used the withholding of wage increases as a device for undermining employee support for the Union, by making comments to employees designed to place the onus for the withholding on the Union or on the employees' selection of the Union as their representative. Cf. *American Telecommunications Corporation, Electromechanical Division*, 249 NLRB 1135, 1137-38 (1980); *Holland American Wafer Company, supra*.

Therefore, I conclude that a preponderance of the evidence does not establish that unlawful considerations had motivated Respondent in failing to apply its nonexempt rate schedule for nonunion warehouse classifications to its Denver warehouse operators on and after October 6 and, accordingly, I shall dismiss that allegation of the complaint.

CONCLUSIONS OF LAW

1. Nissan Motor Corporation in U.S.A. is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union, United Auto Workers, Region No. 5, is a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating employees regarding their own union sympathies and the union sympathies of their coworkers, by soliciting grievances from employees and promising to correct them, and by impliedly threatening to deprive an employee of a transfer because of union considerations, Nissan Motor Corporation in U.S.A. has violated Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent has not violated the Act in any other manner alleged in the complaint.

THE REMEDY

Having found that Nissan Motor Corporation in U.S.A. engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[20]

Nissan Motor Corporation in U.S.A., Denver, Colorado, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees regarding their own union sympathies and the union sympathies of their coworkers; soliciting complaints or grievances that are causing employees to seek representation and promising to correct those complaints or grievances; and threatening to deprive employees of transfers because of union considerations.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Post at its Denver, Colorado, facility copies of the attached notice marked "Appendix."[21] Copies of said notice, on forms provided by the Regional Director for Region 27, after being duly signed by Nissan Motor Corporation in U.S.A.'s representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken

[19] This is so because, where an employer discontinues wage and benefit increases without first satisfying its obligation to bargain, it, in effect, rejects the collective-bargaining process. Such an employer then is in a poor position to argue that it has withheld the change in the interest of participating in a process that, by virtue of its unilateral change, it already has disregarded. However, where, as here, it is not contended that the change had been made unilaterally and in disregard of the employer's collective-bargaining obligation, possibly due to facts known to the General Counsel but not necessarily presented during the course of the hearing, there is no basis for concluding that that employer has rejected the collective-bargaining process and, thus, no basis for establishing, absent other considerations, that the employer was motivated by unlawful considerations in deferring the change for resolution within the collective-bargaining framework.

[20] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[21] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

by it to ensure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 27, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed as to all allegations of unfair labor practices not found herein to have occurred.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all parties had an opportunity to present evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and we have been ordered to post this notice.

The Act gives all employees the following rights:

To organize themselves
To form, join, or support unions
To bargain as a group through representatives of their own choosing
To act together for collective bargaining or other mutual aid or protection
To refrain from any or all such activity except to the extent that the employees' bargaining representative and employer have a collective-bargaining agreement which imposes a lawful requirement that employees become union members.

WE WILL NOT interrogate your own union sympathies and the union sympathies of your coworkers.

WE WILL NOT question you about your complaints and grievances that have caused you to seek representation by International Union, United Workers, Region No. 5, or any other labor organization, and, in connection with that questioning, promise to correct those complaints and grievances.

WE WILL NOT threaten, expressly nor by implication, that you will be deprived of transfers to other positions because of union considerations.

WE WILL NOT in any like or related manner interfere with any of your rights set forth above which are guaranteed by the National Labor Relations Act.

NISSAN MOTOR CORPORATION IN U.S.A.